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THE LAW REVISION COMMISSION AND THE CRIMINAL LAW — UNFULFILLED PROMISE

*Simon Rosenzweig**

The Law Revision Commission of the State of New York was created toward the end of an era in which temporary federal and state crime commissions flourished. It was a period when governments and the public were greatly preoccupied with the problems of the criminal law and its administration. New York, too, had set up a temporary commission to study various phases of the administration of justice, including criminal justice. It was this temporary commission¹ that prompted² the establishment of the Law Revision Commission.

Not unexpectedly, therefore, the statute creating the Law Revision Commission expressly charged it "to recommend . . . such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions."³ The sponsors' and the Legislature's anticipation that the Commission would through the years concern itself with efforts to revise and perfect our system of criminal justice was undoubtedly responsible for the inclusion in the organic law of the Commission of a provision permitting one Commissioner to be a layman,⁴ for it is evident that this field could utilize with profit skills and views in addition to those of the practicing lawyer. Such view was further emphasized by the appointment to the original Commission of an expert in police administration.⁵

In its early years, the activity of the Commission reflected this concern with the criminal law. In the first year of the Commission's existence, one-third of the projects undertaken were in this field. The breadth and range of the subjects studied gave promise that the activity of the Commission in the field of criminal justice would be fruitful and fundamental. These subjects were: expert witnesses, the revision of the Penal Law, the Uniform Extradition Law, the crime of perjury, the laws relating to the reduction of prison sentences for good behavior, and the so-called public enemy law.

The studies of four of these⁶ were concluded and reports were ren-

* See Contributors' Section, Masthead, p. 764, for biographical data.

¹ The Commission on the Administration of Justice.

² Report of Law Rev. Com. 6 (1935).

³ Laws 1934, c. 597; N.Y. Legis. Law § 72.

⁴ N.Y. Legis. Law § 70.

⁵ Bruce Smith.

⁶ Op. cit. supra, note 2, at 12-15, 91-156, 227-343, 477-573, 587-632.

dered to the Legislature. The law governing the crime of perjury was, as a result of the Commission's recommendations, radically revised. The chief concern of the Commission was with the apparent failure of enforcement of the law against perjury, as evidenced by a paucity of convictions. The maximum punishment for perjury was reduced from twenty years to five years, the crime was for the first time divided into two degrees, and the requirement of materiality was removed from the lesser degree.⁷ The adoption of the Uniform Criminal Extradition Law with some modification was proposed.⁸ A revision of the "good time" laws governing reduction of prison sentences for good behavior was made by the Legislature upon the Commission's recommendations.⁹

But perhaps the most important developments in the Commission's activities were not those which resulted in recommendations for legislation. In its first Report, the Law Revision Commission referred to the work of the Commission on the Administration of Justice,¹⁰ which had directed a series of studies looking to the simplification of the Penal Law, and which had declared:

The Commission on the Administration of Justice recognizing revision of the Penal Law as a major need, has presented a preliminary study of the New York law of crimes.

It is hoped by this Commission that the comprehensive study of the Penal Law of New York, begun under its auspices, can be carried to completion by the permanent Law Revision Commission proposed by it, and that the State of New York can thus be given in the near future a modern law of crimes, and one which shall be a model for other states.

After quoting the foregoing passage, the report continued:

The Law Revision Commission has authorized as one of its exploratory, long term projects the structural revision of the Penal Law involving the following:

- (a) The consolidation of all penal provisions of the State, now scattered piecemeal through the consolidated, unconsolidated, and local laws, in one chapter of the law.
- (b) The reclassification of this material upon a scientific basis.
- (c) The elimination of inconsistencies and duplications.

With this work done the Commission proposes to consider a general reform of the Penal Law, urged in this State for many years by various legislative commissions and by the executive. The structural revision, which

⁷ Op. cit. supra, note 2, at 229-230; Laws 1935, c. 632.

⁸ Op. cit. supra, note 2, at 91-156. Although passed by the Legislature, the bill was vetoed by the Governor because of the possibility of abuse. Report of Law Rev. Com. 9-10 (1936). This led to further changes to meet the Governor's objections, and as thus changed, the measure became law. Report of Law Rev. Com. (1937), Laws 1936, c. 892.

⁹ Leg. Doc. No. 60(I), Report of the Law Rev. Com. 477-573 (1935); Laws of 1938, c. 902.

¹⁰ Op. cit. supra, note 2, at 14.

will show what we really now have, is necessary to an intelligent examination of the law for the purpose of its reform.¹¹

This was a heartening note to those who for years had been hoping for and urging the modernization of the Penal Law and its administration.

Another study undertaken in the Commission's first year also sounded a welcome note, indicating that law revision and especially criminal law reform would not be proposed at the expense of cherished liberties and traditional safeguards against oppression and arbitrariness. Governor Lehman had requested the Commission to study a proposed amendment to the disorderly conduct statute which had come to be known as the "Public Enemy Law." That statute¹² made it a crime for persons of ill repute to consort with "thieves or criminals" or frequent "unlawful resorts" with an "unlawful purpose." The proposal which was referred to the Commission for study would have eliminated "unlawful purpose" as an element of the crime or would have established that the mere consorting with "thieves and criminals" was prima facie evidence of an "unlawful purpose."¹³

Rejecting both suggestions and recommending disapproval to the Governor, the Commission declared that "A statute which prohibited objectionable persons from merely associating, without regard to the reason for their association, would be in effect a statute which made their guilt depend simply upon the fact of their being objectionable."¹⁴ The Commission deemed such a statute to be beyond the constitutional powers of government.¹⁵

The Commission, moreover, found that its constitutional objection was reinforced by considerations of desirable policy in the following terms:

The concept that underlies legislation penalizing not specific acts but a course of conduct or mode of life is feudal. . . . It is at variance with just and humane policy,—a policy which finds expression in the principle that an accused shall be specifically informed of the offense charged. Statutes which offend against this principle—once their real nature is understood—arouse popular resentment. The effect of such resentment is to prevent enforcement, and in the long run to lessen the prestige of the law generally and especially of the law against crime. . . .

The dangers of abuse, if a change in the statute were made along either of the lines proposed, are grave. They would be greatest where considerable numbers of persons are involved, as for example in industrial or agricultural disputes. . . .

The underlying purpose is to relieve the police of the necessity of proving that criminals have committed or are planning to commit specific crimes. Instead of proving [specific crimes], the police would as a matter of form

¹¹ *Ibid.*

¹² N.Y. Penal Law, § 722.

¹³ Leg. Doc. No. 60(K) at 3, Report of Law Rev. Com. 589 (1935).

¹⁴ *Id.* at 4, Report of Law Rev. Com. at 590.

¹⁵ *Ibid.*

discharge their duty by showing merely that the gangsters had come together. . . . We do not believe that by any such means can the prestige of the criminal law be maintained or an effective administration of justice secured.¹⁶

This study demonstrated once more that no section of the law is more intimately related to the historic freedoms and safeguards against abuse than the criminal law nor more readily lends itself to infringements.

In its second annual Report,¹⁷ the Commission continued to include in its agenda an impressive number of criminal law projects. Four such studies were undertaken¹⁸ and six additional subjects were listed for future consideration.¹⁹ Not all the studies undertaken resulted in recommendations to the Legislature or in proposals for legislation. In this Report, a section²⁰ entitled "Cooperation in Criminal Law Reform" recounted its activities in this field. The Commission had received and considered the presentment of the New York County Regular Grand Jury for the May, 1934 term, in which a thorough study of the Penal Law by the Commission was urged. The Commission and its members had also participated in the 1936 crime conference called by the Governor of New York. The Commission had also cooperated with the Interstate Commission on Crime and had taken part in its meeting held at Trenton, New Jersey. This report stated:

The Commission has noted an intensified demand for Penal Law revision. . . .

The work of the revision of the penal law is necessarily a long term project. It must be thoroughly studied and carefully done. It should avoid all characteristics of haphazard amendment. An important phase of the work is reclassification, for on this, much in the way of mechanical revision depends. Progress is being made in this field.²¹

Indeed, in the only new proposal for legislation in this field to the 1936

¹⁶ *Id.* at 45, Report of Law Rev. Com. at 590-591. Ironically, despite the Commission's condemnation of the measure, one of the undesirable alternatives was enacted. Laws 1935, c. 921.

The Commission's opinion, however, was vindicated in the first test of this statute in the Court of Appeals. In *People vs. Pieri*, 269 N.Y. 315, 199 N.E. 495 (1936), the court, while holding the act constitutional, narrowed its scope considerably because of constitutional requirements and held at page 324:

Mere association of people of ill repute with no intent to breach the peace or to plan or commit crime is too vague a provision to constitute an offense. Neither can reputation alone—bad reputation—be made a crime. Suspicion does not establish guilt. . . . Besides, the prosecution, even with the aid of this presumption, must still prove to the satisfaction of the judge, beyond a reasonable doubt, that the consorting was in reality for an unlawful purpose; the burden of proof is not shifted.

In so holding, the court reversed the convictions and dismissed the information.

¹⁷ Report of Law Rev. Com. 7-26 (1936).

¹⁸ *Id.* at 18, 19.

¹⁹ *Id.* at 24-26.

²⁰ *Id.* at 14, 15.

²¹ *Id.* at 20-21.

Legislature,²² the Commission justified another piecemeal change in the laws relating to the reduction of sentence for good behavior in prison—this time as to fourth offenders, on the ground that the situation treated involved an obvious inequity. The recommendation to the Governor who had requested the study declared:

The Commission believes in general that before any broad change in the law relating to punishment is made, thorough study of the problem and its relation to the entire question of punishment is essential. . . .²³

In its third year, work on criminal law revision yielded two extensive studies—one of the entire New York law of homicide²⁴ and the other, a comprehensive study of the New York law concerning sexual crimes.²⁵ Both these projects stemmed from requests from the Governor—requests much narrower in scope than the ultimate studies. The homicide study resulted from a referral to the Commission of the problems arising out of the rules governing felony murder;²⁶ and the sexual crimes study was an outgrowth of a request for a study of the law relating to second degree rape.²⁷

The Governor was undoubtedly impelled to make both these suggestions because of unfairness and questionable policy revealed in the operation of the law of felony murder and of second degree rape.²⁸ The studies initiated by those suggestions demonstrated that it was not possible to investigate either of these subjects without at the same time considering the entire law of homicide and the entire law of sexual crimes. Indeed, the homicide study indicated that solution of the problems of the law governing a specific class of crimes such as homicide involved basic views of the nature and function of criminal justice and punishment.²⁹

While a course of statutory change was suggested in the homicide study,³⁰ the Commission decided that it would make no recommendations for legislation because "the homicide chapter of the Penal Law could be better revised when a study of related subjects, such as attempts, accessories and conspiracies, had progressed further, and more careful consideration had been given to underlying problems. It has therefore concluded that the proposal of a new article on homicide or of amendments to the existing statute should await the conclusion of further study of the

²² Leg. Doc. No. 65(I), Report of Law Rev. Com. 609-617 (1936).

²³ Op. cit. supra, note 17, at 616.

²⁴ Leg. Doc. No. 65 (P), Report of Law Rev. Com. 515-870 (1937).

²⁵ Leg. Doc. No. 65(O), Report of Law Rev. Com. 399-514 (1937).

²⁶ Op. cit. supra, note 24, at 517, 665-676; op. cit. supra, note 17, at 19.

²⁷ Op. cit. supra, note 25, at 401, 405; op. cit. supra, note 17 at 19.

²⁸ Supra, notes 26 and 27.

²⁹ Op. cit. supra, note 24, at 517, 597-612.

³⁰ Op. cit. supra, note 24, at 597-612.

Penal Law.³¹ Presumably, although not voiced, this was also the Commission's reason for refraining from suggestions for legislative revision of the law of sexual crimes.³²

Unfortunately, with the 1937 Report, the Commission had reached the high water mark in the study of the criminal law. The general subject of revision of the Penal Law was carried as a "pending project" for two more years³³ in the Commission's reports to the Legislature and then was completely dropped in its 1940 Report, never to reappear.

In the eighteen years since the publication of the studies on homicide and sexual crimes, the Commission's calendars of completed studies, legislative proposals, pending projects, and proposals for future consideration revealed a sparseness of activity, if not of interest, in the field of criminal law and certainly of a fundamental general re-examination of the Penal Law. In some years,³⁴ no recommendations or studies were reported. In other years,³⁵ the sole recommendation was a resubmission of a proposal that had failed of enactment in the previous years. In those years in which legislation was proposed, the subjects were for the most part very limited in scope and confined to specific instances of inequities and without any attempt to correlate the subject studied to any basic approach to Penal Law revision.

In 1939, two bills concerning perjury were proposed. One bill would have made it clear that the issue of materiality, which was the decisive element in determining whether perjury was first degree or second degree was always to be determined by the jury.³⁶ This did not pass. The other bill which was enacted declared that false translation by an interpreter could be either first or second degree perjury.³⁷ Immunity from criminal prosecution provided in many civil statutes to facilitate remedial action which required a person to testify was, on the Commission's recommenda-

³¹ *Op. cit. supra*, note 24, at 517.

³² *Op. cit. supra*, note 25, at 401.

³³ Report of Law Rev. Com. 15 (1938), Report of Law Rev. Com. 14 (1939).

³⁴ 1938, 1941, 1944, 1951, 1955.

³⁵ 1943, 1947, 1954.

³⁶ Leg. Doc. No. 65(G), Report of Law Rev. Com. 307-326 (1939).

Only recently the effect of the Commission's studies and recommendations was demonstrated. Though this proposal failed in enactment, fourteen years later in *People vs. Clemente*, 285 App. Div. 258, 136 N.Y.S. 2d 202 (1st Dep't 1954), the court declared:

. . . we accept the Commission's statement [in its 1939 report, page 307] as to the purpose of the 1935 and 1936 amendments and it seems to us that the purpose can be served and the law carried out only by submitting to the jury the question of materiality.

Thus the Commission's proposal for legislation, though not enacted, became effective through judicial decision.

³⁷ *Id.* at 307-310; *Laws* 1939, c. 186.

tion,³⁸ modified to provide uniformly that the grant of immunity would result only from an express claim of constitutional privilege against self-incrimination and an order by the court or presiding official, requiring that the testimony be given.

In 1945, the Commission successfully recommended that second and third offenders, convicted of first degree robbery or burglary and sentenced to mandatory life terms under statutes subsequently amended to provide for indeterminate sentences, should be given the benefit of the indeterminate sentence permitted under the most recent amendments of the second and third offender laws.³⁹

In 1946, the Commission's recommendation that the statute of limitations for larceny by a fiduciary should not begin to run until the discovery of the defalcation⁴⁰ was enacted. In 1948, the Commission recommended that the function of granting discretionary reduction of sentences because of good behavior of a prisoner be transferred from the Governor to the prison boards of the several state prisons and penitentiaries.⁴¹ This administrative change in the penal system was enacted.⁴²

These measures undoubtedly were aimed at correcting specific instances of injustice or defects of administration. Since the existence of unfair quirks, illogicalities, arbitrariness, or unequal treatment of apparently similar cases reflects upon the entire system of criminal justice, these proposals were a contribution to the improvement of the law. But confined and restricted as they were to the specific situations in need of change or rectification, they merely were adjustments in the existing framework of the Penal Law and its administration. They did not concern themselves or discuss the premises of the Penal Law nor take cognizance of contemporary questionings of those premises and suggestions for fundamental change. Indeed, to have done so might have led, as in the case of the projects relating to the law of homicide and sexual crimes, to postponement of immediate solutions for the specific problems involved. Yet the failure to take a more fundamental approach gives these changes the character of minor and sporadic efforts.

Several proposals, made after the abandonment of the project for comprehensive Penal Law revision were by their very nature of considerable importance. In 1940, to effectuate the guarantee in the State Constitution of the right of an accused to counsel, the Commission successfully⁴³ recommended the enactment of a requirement that a person accused of a

³⁸ Leg. Doc. No. 65(I), Report of Law Rev. Com. 337-469 (1942); Laws 1943, c. 335.

³⁹ Leg. Doc. No. 65(G), Report of Law Rev. Com. 213-238 (1945); Laws 1945, c. 726.

⁴⁰ Leg. Doc. No. 65(D), Report of Law Rev. Com. 95-117 (1946); Laws 1946, c. 210.

⁴¹ Leg. Doc. No. 65(M), Report of Law Rev. Com. 521-573 (1948).

⁴² Laws 1948, c. 631.

⁴³ Leg. Doc. No. 65(C), Report of Law Rev. Com. 91-104 (1940); Laws 1940, c. 423.

misdemeanor or an offense must be informed of his right to counsel when brought before the court. This proposal filled a gap in the statutory safeguards supplementing constitutional rights, for prior to its enactment, the duty of the state to advise an accused of his rights to counsel was applicable only in felony prosecutions.⁴⁴

In 1946, the Commission recommended the elimination of inequalities among various groups of prisoners.⁴⁵ Piecemeal and *ad hoc* amendments of the Penal Law and Correction Law had created disparities in treatment of prisoners in the same categories.⁴⁶ For instance, those sentenced for first degree burglary and robbery were subject to different maximum and minimum periods of confinement, according to the laws which happened to be in effect either at the time of sentence or of imprisonment. Fourth offenders were subject to differing prison terms—differences resulting from legislative changes reducing punishments but failing to conform sentences already imposed to these ameliorative amendments. Similar causes created disparities of sentence and confinement of second and third offenders. Even remedial legislation previously adopted to eliminate inequities failed to realize their purpose fully because of accidents of phrasing or inadequate identification of the groups of prisoners to be benefited. This proposal, however, was vetoed by the Governor without memorandum,⁴⁷ and when resubmitted in amended version and passed by the Legislature was again vetoed.⁴⁸

Thereafter the Commission abandoned the proposal. Despite the failure of the Commission to obtain the enactment of the suggested changes, the study and recommendation served to highlight the need for an over-all view of the functioning of our penal system. Such studies demonstrate the deficiencies of piecemeal legislation and the need for periodic comprehensive study of our system of criminal justice. At the same time, it should be observed that neither the Commission's recommendations⁴⁹ nor the supporting study attempted to integrate the conclusions reached with sound basic considerations and principles of treatment and, indeed, of criminal justice. No attempt at analysis was made beyond that of demonstrating disparity; and the desirability of conforming existing sentences to the most recently enacted legislation governing a category of offenders or of crimes was the assumed premise. Perhaps this mechanical approach and the absence of any attempt to relate the proposal to fundamental

⁴⁴ *Op. cit. supra*, note 43, at 98-99.

⁴⁵ Leg. Doc. No. 65(M), Report of Law Rev. Com. 729-787 (1946).

⁴⁶ *Op. cit. supra*, note 45, at 735-737.

⁴⁷ Report of Law Rev. Com. 12 (1947).

⁴⁸ Report of Law Rev. Com. 20, 21 (1948).

⁴⁹ See note 45 *supra*.

premises was, in part at least, responsible for the failure of a project so meritorious on its face.

In a series of more successful proposals, the Commission struck at certain disabilities resulting from felony convictions. In 1946, its proposal⁵⁰ to restore the right to sue to all persons sentenced to state prison for less than life, while execution of sentence is suspended or while on parole, was enacted.⁵¹ In recommending this change, the Commission observed that a convict on parole "is presumably endeavoring to pursue a normal course of life. To deny him capacity to sue is at the outset to place him at a serious disadvantage in conducting business affairs or vindicating personal rights." Similarly, to deny one on whom execution of sentence has been suspended the right to sue tends to defeat the very purpose of the treatment accorded—integration of such offenders into the normal life of the community.

In 1950, as a result of the Commission's recommendation, life prisoners on parole were given the right to marry.⁵² In making its proposal, the Commission again emphasized the need to effectuate the policy of enabling parolees to lead normal lives. Disability to contract a binding marriage "deprives an unmarried life prisoner on parole of the opportunity to establish and conduct a normal family life, and is an obstacle to successful rehabilitation in many cases. A survey by the Department of Justice of almost 85,000 parole case histories indicates that a change would be in the best interests of society, by demonstrating that married parolees, as a class, are unquestionably more law abiding than single ones."⁵³

These considerations led the Commission in 1952 to take another step in the removal of disabilities for conviction for crime. It recommended that persons sentenced to life imprisonment, while released on parole or while execution of sentence is suspended, be given the right to sue; and the proposal was enacted.⁵⁴ In 1953, the Commission successfully sponsored legislation which restored the right to sue and to marry to convicts completely discharged from parole under a sentence to state prison.⁵⁵

Viewed in retrospect, the achievements of the Law Revision Commission in the field of criminal law fall short of the promise and hopes raised in its early years. The reasons for its failure to fulfill expectations of fundamental Penal Law study, and possibly revision, must remain con-

⁵⁰ Leg. Doc. No. 65(F), Report of Law Rev. Com. 159-195 (1946).

⁵¹ Laws 1946, c. 260.

⁵² Leg. Doc. No. 65(K), Report of Law Rev. Com. 259-283 (1950); Laws 1950, c. 144.

⁵³ *Op. cit. supra*, note 52, at 263.

⁵⁴ Leg. Doc. No. 65(Q), Report of Law Rev. Com. 533-553 (1952); Laws 1952, c. 167.

⁵⁵ Leg. Doc. No. 65(M) (1953) [At printing, Report of Law Rev. Com. (1953) unbound. No page citations available—Ed.]; Laws 1953, c. 176.

jectural. Since no explanations were given for the abandonment of the project, one can only surmise a variety of reasons. Perhaps limitations of budget and personnel and more insistent pressure for studies in other fields compelled the decision. Perhaps there was a feeling that a specialized commission of experts in the field would be a better instrument for conducting a study of the Penal Law and criminal justice in New York. Perhaps, too, the troubled times through which our nation has passed since the establishment of the Commission distracted attention from the problems of the criminal law, until recently, and led to an impression of lack either of need or of support for Penal Law reform.

Certainly the need of comprehensive Penal Law study is as desirable, and even urgent, now as ever before. The process of accretion by piecemeal amendment and tinkering has created inconsistencies and contradictions both in the wording of the law and its operation. Disparate treatment in the Penal Law of crimes of the same nature⁵⁶ are not only confusing in enforcement but contribute to a breakdown of respect for the law. The Commission's 1946 study also demonstrated some of the inequities in punishment. Doubtless, such shortcomings of the law may also contribute to difficulties in prison administration and frustration of efforts to achieve what must be at least one of the aims of the criminal law—rehabilitation of offenders.

The sentencing sections of the Penal Law are still strikingly repressive and punitive. Minimum sentences may range as high as ten to twenty years for first offenders.⁵⁷ Provisions permitting maximum sentences of

⁵⁶ A few of the many illustrations scattered throughout the N.Y. Penal Law are:

Firearms and burglar's tools: N.Y. Penal Law § 2371—tramp (person convicted as a tramp under § 887 (a) of the Code of Crim. Proc.) carrying firearms and burglar's tools felony—3 years imprisonment. N.Y. Penal Law § 1897—possessing firearms if previously convicted of crime—7 years imprisonment or \$1000 fine or both; if not previously convicted, misdemeanor (1 year or \$500 or both). N.Y. Penal Law § 408—carrying burglar's tools—if previously convicted—7 years imprisonment or \$1000 fine or both; if not previously convicted, misdemeanor.

Begging: N.Y. Penal Law § 1990-a (begging on train or in station) offense, 30 days, or \$10 fine or both. N.Y. Penal Law § 722 (disorderly conduct) 6 months or \$50 or probation for 2 years. N.Y. Code of Crim. Proc. § 887 (5)—6 months at hard labor in penitentiary or county jail.

Abandonment of Children: N.Y. Code of Crim. Proc. § 899 (1)—6 months or \$250 fine or both; N.Y. Penal Law § 480—felony—2 years or \$1000 fine or both. N.Y. Penal Law § 482—misdemeanor—1 year or \$500 fine or both.

Compulsory Prostitution: N.Y. Penal Law § 70—abduction for purposes of prostitution—10 years or \$1000 fine or both. N.Y. Penal Law § 2460—Compulsory prostitution—2 to 20 years or \$5000 fine or both.

Removing railroad signal: N.Y. Penal Law § 1422—10 years. N.Y. Penal Law § 1991—5 years or 20 years.

⁵⁷ Although the Penal Law has adopted the general principle of the indeterminate sentence

great length for first offenders are not uncommon.⁵⁸ This characteristic is underlined by the Penal Law provisions dealing with recidivism.⁵⁹ The yardstick of statutory graduation of punishment seems to be accidental and arbitrary. It should be recalled, too, that the Penal Law, for the

with a minimum of one year for felonies (N.Y. Penal Law § 2189), this rule is not applicable to crimes which specify a higher minimum sentence. Such different minima are fixed for an entire calendar of crimes, seemingly arbitrarily. Cf. the following minimum sentences fixed by the Penal Law: § 407, burglary, first degree, 10 years; § 690, sodomy, one day; § 852, extortion by force, 5 years; § 1048, murder, second degree, 20 years; § 1250, kidnapping (alternate punishment) 20 years; § 2010, rape, first degree (alternate punishment) one day; § 2125, robbery, first degree, 10 years; § 2460, compulsory prostitution, 2 years and 3 years; § 2461, woman concealing birth of child, 2 years. § Section 1944, committing crime while armed, authorizes 5 years to be added to minimum prescribed for underlying crime, and 10 years and 15 years for second and third offenders respectively.

⁵⁸ Illustrations of the range of sentences specified by the N.Y. Penal Law are:

§ 70	Abduction		10 years
§ 224	Arson	1st degree	40 years
		2nd degree	25 years
		3rd degree	15 years
§ 241	Assault	1st degree	10 years
			(alternative sentence to life)
§ 407	Burglary	1st degree	30 years
		2nd degree	15 years
		3rd degree	10 years
§ 690	Sodomy	1st degree	20 years
			(alternative sentence to life)
§ 852	Extortion by force		20 years
§ 856	Blackmail		15 years
§ 886	Forgery	1st degree	20 years
§ 888	Forgery	2nd degree	10 years
§ 1048	Murder	2nd degree	life
§ 1053	Manslaughter	2nd degree	15 years
§ 1253	Kidnapping (varying with circumstances)		10 years; death; life
§ 1290	Grand Larceny	1st degree	10 years
§ 1308	Receiving stolen goods		10 years
§ 1400	Maiming		15 years
§ 1420	Damaging building or vessel by explosion		25 years
§ 1895	Maliciously placing explosive near building		25 years
§ 2010	Rape	1st degree	20 years or life
§ 2125	Robbery	1st degree	30 years
§ 2127	Robbery	2nd degree	15 years
§ 2460	Compulsory Prostitution (varying with circumstances)		20 years
			25 years

⁵⁹ N.Y. Penal Law § 1941 for 2nd and 3rd offenders requires the imposition of a minimum sentence of not less than half of the longest term permissible for the crime and permits a maximum sentence for a period twice the maximum prescribed for the crime. N.Y. Penal Law § 1940 prescribes an indeterminate sentence of one day to life imprisonment for sex offenders who commit another felony. Section 1942 prescribes an indeterminate sentence for 4th offenders of at least 15 years to life imprisonment, with the minimum increasing to match the maximum prescribed by the Penal Law for the crime committed.

most part is a carry-over of the Penal Code of 1881.⁶⁰ It contains many ideas and principles acceptable in that day but at least questionable now.

Age and severity of the Penal Law may not be conclusive factors indicating need for reform. Yet in a field in which there has been such ferment of ideas and discussion, they at least signify the need for re-examination of hitherto accepted premises and principles. Our knowledge and conceptions of human conduct and its mainsprings have expanded. More specifically, there have been appraisals and reappraisals of penal principles and practices which may throw light upon whether and in what respect the Penal Law and its correlative statutes require over-all revision. In the three-quarters of a century since the Penal Law was enacted, advances in psychology and psychiatry could not help but affect basic premises and conceptions in the law relating to crimes and the treatment of offenders. The most fundamental assumptions of criminal responsibility have been sharply challenged.⁶¹ The principle of individualization in the treatment of offenders makes dubious many of our statutory rules and penal practices. Probation, parole, the "good time" laws already the subject of several studies by the Commission,⁶² the fine as an instrument of penal policy so haphazardly treated in the Penal Law,⁶³ the integration into the system of criminal justice of the special codes already enacted or under study for special groups of offenders, all require careful study.

The provisions relating to the indeterminate sentence need re-examination, for they raise fundamental questions,—even as to the desirability of the indeterminate sentence as an instrument of criminal justice.⁶⁴

⁶⁰ 39 McKinney's Consolidated Laws of New York Annotated, xi to xx.

⁶¹ In this connection, it is interesting to note that in recommending the Sex Offender's Act to the Legislature, the Governor expressed the following point of view:

The study [of sex offenders by a special commission] has accumulated substantial data supporting the thesis that the causes of sex crime, and probably other crime also, are closely associated with unfavorable emotional conditions in early childhood. Brutality, or dominating, or excessively doting parents, or broken homes, lie in the background of almost all these cases. . . .

The proposal that all sex felons be given a thorough psychiatric examination before sentencing is a sound one. It would be desirable if this could be done with all offenders convicted of major crimes. . . .

It should be emphasized that no revisions in our statutes can wipe out sex crimes. Sex criminals of the types studied at Sing Sing are not likely to be deterred by fear of a long sentence.

Public Papers of Governor Thomas E. Dewey 160, 161 (1950).

See also the Report on the Study of 102 Sex Offenders at Sing Sing Prison, and especially the section entitled "Irrational Motivation." Public Papers of Governor Thomas E. Dewey 162, 168 (1950).

⁶² See notes 9, 22, 39, 45 supra.

⁶³ Supra, note 56 for a few examples.

⁶⁴ See, for example, Rubin, "Indeterminate Sentence—Success or Failure," 28 Focus (Journal of National Probation and Parole Association) 47 (1949); Book Review, Ancil, "The Indeterminate Sentence," 33 Focus 169 (1954).

Certainly the type of indeterminate sentences prescribed by the Penal Law—in some instances minimum sentences for first offenders of ten or twenty years⁶⁵ and permitting maximum sentences of similar duration or as much as life imprisonment⁶⁶—raise serious doubts as to whether they do not defeat their very purpose. The flexibility and wide discretion in the treatment of offenders granted increasingly through the years to the courts and other government agencies suggest the need for statutory safeguards against abuse.⁶⁷

The need to rearrange the substantive provisions of the Penal Law, a long standing project,⁶⁸ would be a sizeable task in itself. In the course of this rather mechanical work, undoubtedly much overlapping and inconsistency in the provisions of the Penal Law would be eliminated. The definitions of and punishments for the various crimes would be subjected to scrutiny; and important substantive changes—many long overdue, as in the case of the law of homicide—would undoubtedly result.

There has been some indication that the government and the people of the state would be receptive to such an undertaking. In the few instances in recent years in which new approaches in limited areas of criminal justice were proposed, the response has been favorable. In 1945, the Governor proposed “that legislation be enacted whereby the restraint and disabilities imposed by law upon released felons be made mandatory only for a fixed period. Thereafter, upon the showing of sufficient rehabilitation and by unanimous vote of the Parole Board these disabilities should cease to be effective.” This step was urged “to assist men and women who genuinely seek rehabilitation. They should not be prevented from becoming useful citizens nor unnecessarily carry a stigma long after character and reputation have been re-established.”⁶⁹ As a result of these proposals, a series of bills to make possible in proper cases the removal of a wide range of disabilities resulting from criminal convictions and the restoration of worthy convicts to full citizenship was enacted.⁷⁰

In 1950, a program for the treatment of persons convicted of sexual offenses was enacted.⁷¹ This law not only made important substantive changes in several Penal Law articles dealing with sexual offenses, but

⁶⁵ See note 57 *supra*.

⁶⁶ See note 58 *supra*.

⁶⁷ Cf. *Williams v. New York*, 337 U.S. 241 (1949); Rubin, “Probation and Due Process,” 31 *Focus* 40 (1952).

⁶⁸ Report of Law Rev. Com. 14 (1935).

⁶⁹ Public Papers of Governor Thomas E. Dewey 25 (1945).

⁷⁰ Laws 1945, cs. 93, 94, 95, 97, 268, 443, 870. See Public Papers of Governor Thomas E. Dewey 227-228 (1945).

⁷¹ Laws 1950, c. 525.

also introduced new principles in the sentencing procedure. As an alternative to the terms of imprisonment already prescribed for such offenses by the Penal Law, courts were authorized to impose an indeterminate sentence of one day to life imprisonment,⁷² but only after a complete psychiatric report of the offense should have been rendered to the court.⁷³

Increasing legislative attention and effort has been given to the problem of the youthful offender. In 1943, the Youthful Offender Act was adopted⁷⁴ to place first felony offenders in the age group of sixteen to nineteen years in a special category and to remove from those adjudicated youthful offenders the stigma of a criminal conviction. In 1954, this measure was revised and expanded to include youthful offenders between the ages of sixteen and twenty-one years,⁷⁵ "based on the theory of correction, reform and rehabilitation of the individual for his own benefit and for the welfare of the state."⁷⁶

Though these are only straws in the wind, there is a feeling abroad that all is not right with the administration of criminal justice and that the time is ripe for basic reforms. In many other states, and, indeed, throughout the English speaking world, voices have been raised and steps have been taken for comprehensive and basic revision of the criminal laws.⁷⁷

⁷² N.Y. Penal Law §§ 243, 483-a, 483-b, 690, 1940, 1944-a, 2010.

⁷³ N.Y. Penal Law § 2189-a. In approving the act, the Governor declared:

The procedures contemplated by this bill are limited to sex offenders.—This limitation is made not because these sex offenders constitute a group scientifically divided from other criminals but because it is impossible to attempt at one step to apply such a change to all prisoners. The experience gained as a result of this law will, it is hoped, not only lead to improved treatment of sex offenders but to the more constructive and intelligent treatment of all criminals.

Public Papers of Governor Thomas E. Dewey 412 (1950). See also *supra* note 61.

⁷⁴ Laws 1943, cs. 549, 551, N.Y. Code of Crim. Proc. §§ 913 e-r, N.Y.C. Crim. Ct. Act §§ 31a-l.

⁷⁵ Laws 1954, c. 803. This Act was drafted as the result of a study prepared for the New York State Department of Correction by the Legislative Drafting Research Fund of Columbia University.

⁷⁶ McKinney's 1954 Session Laws 1416, Governor's Memorandum of Approval.

⁷⁷ "Canada's New Criminal Code," 33 Can. B. Rev. 1 (1955); MacLeod and Martin, "The Revision of the Criminal Code," 33 Can. B. Rev. 3 (1955); Wingersky, "Report of the Royal Commission on Capital Punishment (1949-1953): A Review," 44 J. Crim. L., C. & P.S. 695 (1954); Laub, "Sentence and Release in Pennsylvania—A New Approach," 27 Temp. L.Q. 430 (1954); Smith, "New Criminal Code Proposed by Louisiana State Law Institute," 2 La. S. Bar Ass'n Rep. 12 (1942); Bennett, "Louisiana's Criminal Code of 1942," 20 U. Kan. City L. Rev. 208 (1952); Wilkinson, "Reform of the Criminal Law," 14 Modern L. Rev. 437 (1951); Hall, "Revision of Criminal Law—Objectives and Methods," 33 Neb. L. Rev. 383 (1954); Remington, "Criminal Law Revision: Codification vs. Piecemeal Amendment," 33 Neb. L. Rev. 396 (1953); Comment, "Proposed Revisions in the Illinois Criminal Code," 48 Nw. U.L. Rev. 198 (1953); "Criminal Law Revision in Missouri—A Symposium," 20 U. Kan. City L. Rev. 197-316 (1952); Remington, "A Proposed Criminal Code for Wisconsin," 20 U. Kan. City L. Rev. 221 (1953); Warren and Daniels, "California's New Penal and Correctional Law," 32 Calif. L. Rev. 230 (1944); Fisher, "A

The American Law Institute project of a model penal code, originally initiated by the Uniform Law Commissioners years before, has been given new life and is now taking shape.⁷⁸ The American Bar Association has undertaken a project for a survey of criminal justice throughout the United States "as an authoritative foundation upon which sound and lasting remedial measures may be based."⁷⁹

Both the great need and the propitious time have created another opportunity for the Commission to fulfill its early promise of penal law reform. Not only the mandate of its organic law, but also its special status as a permanent agency should impel it to resume the task. To do so would in itself be a public service, for it would eliminate the danger of makeshift proposals and efforts and prevent delegation of the work to a temporary group, perhaps prompted by the headlines of the moment. The Commission with its tradition of solid and thorough research, its established practice of enlisting expert assistance, and its realization that its responsibility would not end with the making of proposals, would be a far more desirable agency to undertake the work.

The experience with the Sexual Offenders Law illustrates the shortcomings of study and revision by special, temporary groups. It was a frankly experimental proposal, and though containing many interesting features, the provision for an indeterminate sentence with a maximum of life imprisonment was extremely dubious. This very feature may be creating a serious obstacle to the use of the law.⁸⁰ But the temporary group which sponsored the proposal is now disbanded. Its collective experience and background gained from study of the problem and its deliberations in reaching its recommendations are now lost for further constructive work.

The pendency of projects,⁸¹ national in scope, for the study of the criminal law and its administration are additional reasons for the Commission's resumption of work in this field. If it is to undertake the project, the Commission should actively keep abreast of these projects as they develop and should be familiar with the premises and thinking upon

Proposal for a Penal Code," 39 Ill. L. Rev. 97 (1944); "Report of the State Penal and Correctional Survey Commission," 24 Ind. L.J. 1, 18, 19, 23 (1948).

⁷⁸ Wechsler, "The Model Penal Code Project of the American Law Institute," 20 U. Kan. City L. Rev. 205 (1952); Wechsler, "The Challenge of a Model Penal Code," 65 Harv. L. Rev. 1097 (1952).

⁷⁹ Sherry, "The American Bar Association's Survey of Criminal Justice," N.Y.L.J., April 5, 1955, p. 4. See also "Criminal Justice: The Vital Problem of the Future," 39 A.B.A.J. 743 (1953). This survey will concern itself with procedural and enforcement aspects.

⁸⁰ Annual Report of the Prison Association of New York, Leg. Doc. No. 44, at 17 (1952); Annual Report of the Prison Association of New York, Leg. Doc. No. 29, at 19, 20 (1953).

⁸¹ See notes 78 and 79 supra.

which they are based, as they proceed from stage to stage to their ultimate conclusions. At the same time, the Commission could proceed with its own studies in the light of the peculiar needs, the historical background, the special problems, and the public policies of New York. It would have to arrive at its own decisions as to the most acceptable premises of the work. Ultimately it would have to determine whether an effective revision of the Penal Law could be achieved on the basis of the premises upon which that Law is now based and within its present framework,⁸² or on the bases of new or modified assumptions.

The call to the Commission has already come from some respected quarters.⁸³ Only the future will reveal whether it will seize the opportunity to develop a code of criminal justice suited to the needs of the State and embodying the soundest principles that the combined efforts of the law, science, and the related disciplines can produce.

⁸² Wechsler, "The Criteria of Criminal Responsibility," 22 U. of Chi. L. Rev. 367, 375 (1955).

⁸³ Annual Report of the Prison Association of New York, Leg. Doc. No. 41, at 25, 26 (1954):

For a number of years we have recommended that the Legislature authorize the Law Revision Commission or some other suitable body to conduct an examination into the sentencing process. In this recommendation we have been joined by the findings of the Knapp Report of 1952. This year, however, we join with others in urging a broader and more all-inclusive study leading to the revision of the penal law. As is well known, the last examination of any consequence was conducted in 1909 when the consolidated penal law was adopted. In simple terminology the penal law of today is geared not to the present stage of life but instead to the horse and buggy days of 45 years ago. While the American Law Institute is conducting a draft of a model penal law, it would seem most appropriate for an exploratory group to be authorized now looking to revision of the penal law of this State.